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Supreme Court, U.S.
FILED
JUN 1 1999
CLERK

No. 98-1661

In The

Supreme Court Of The United States

October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The respondents submit this supplemental brief pursuant to Supreme Court Rule 15.8, which permits "any party to file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to . . . intervening matter not available at the time of the party's last filing."

In its opposition to the petition for a writ of certiorari, the respondents pointed out to this Court that the petitioner, Fleet Bank, N.A., and the respondent Commissioner are presently engaged in litigation in the federal district court and court of appeals (in an action the petitioner filed after this one), as welll as in Connecticut state court. In these proceedings the parties are in dispute over several issues related to whether the petitioner and other national banks may impose ATM surcharge fees in Connecticut.

Since the respondent filed its opposition, the petitioner has filed yet another motion for a preliminary injunction in the federal district Court, seeking once again to enjoin the respondent Commissioner from proceeding under state law to prevent the imposition of such fees. (*See* Appendix) By its own hand, therefore, the petitioner has again increased the already high likelihood that the issues surrounding the legality of ATM surcharge fees in Connecticut will be resolved in one of the Nation's "inferior courts," state or federal. From either party's point of view, that will moot *this* case, despite the fact that the proceedings in those courts do not raise the jurisdictional issue the petitioner asks this Court to consider.

It hardly needs to be said that this Court does not exist to indulge the parties' academic interests. Rather, it is more consistent with this Court's practice and prudence to

await one of the "myriad" cases the petitioner itself claims the opinion below will apply to, in which the parties will more likely remain at issue over the question presented.

Respectfully submitted,

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APPENDIX

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First Union National Bank v. The Honorable John P. Burke/Fleet National Bank v. The Honorable John P. Burke; Civil Action No. 3:98CV02171(JBA); Plaintiff Banks' Joint Motion For a Temporary Restraining Order and/or Preliminary Injunction A2

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FIRST UNION NATIONAL BANK	:	
Plaintiff	:	
v.	:	**CIVIL ACTION NO.**
	:	**3:98CV02171(JBA)**
THE HONORABLE JOHN P. BURKE,	:	
acting in his official capacity as	:	
Banking Commissioner of the State of	:	
Connecticut,	:	
Defendant	:	
	:	
FLEET NATIONAL BANK,	:	
Plaintiff	:	
	:	
v.	:	
	:	
THE HONORABLE JOHN P. BURKE,	:	
acting in his official capacity as	:	
Banking Commissioner of the State of	:	
Connecticut,	:	
Defendant	:	**May 17, 1999**

PLAINTIFF BANKS' JOINT MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65, First Union National Bank ("First Union") and Fleet National Bank ("Fleet") hereby moves this Court, on the basis of the legal assertions in their respective amended complaints (collectively the "Amended Complaints") and the supporting factual affidavits of, in the case of First Union, Daniel Glassberg, and, in

the case of Fleet, Robert B. Hedges, Jr. and Nandina Bahkski (the foregoing affidavits of Ms. Bahkski and Messrs. Glassberg and Hedges being hereinafter collectively referred to as the "Affidavits"), to enter an order against the defendant, The Honorable John P. Burke, acting in his official capacity as Banking Commissioner of the State of Connecticut (the "Commissioner"), temporarily restraining and enjoining the Commissioner, as well as any other person acting in concert with him or pursuant to his direction, from prosecuting, maintaining or commencing any state court enforcement, restitution, or injunctive proceedings against Fleet or First Union with respect to the matters referred to in said amended complaints. First Union and Fleet additionally request, pursuant to Rule 65, that the Court enter a preliminary injunction against the Commissioner under these same terms.

In support of this motion, First Union and Fleet (collectively, the "Banks") state as follows:

1. The Banks ae national banking associations organized under the subject to the laws of the United States. They each maintain ATMs throughout the State of Connecticut

2. As more particularly described in the Amended Complaints and the Affidavits, the Banks seek to charge non-depositor customers of their respective ATMs for such non-depositor customers' use thereof.

3. The Banks' right to maintain ATMs and to charge non-depositors for their use is permitted under federal law, specifically, 12 U.S.C. §24 (Seventh), and the Banks' principal federal regulator, the Office of the Comptroller of the Currency ("OCC"), has expressly so opined.

4. The OCC's interpretation of the National Bank Act is entitled to substantial deference.

5. On or about November 12, 1998, the Banks sought a preliminary injunction from this Court, which injunction sought to "restrain [] and enjoin [] the Commissioner, as well as any and all persons acting in concert with him or pursuant to his direction, from acting in any way to prevent, impede, or interfere with [their] assessment and collection of charges for the use of [their respective] automatic teller machines (ATMs) by [their respective] non-depositor customers . . . including, but not limited to, the institution of state court enforcement or declaratory judgment proceedings . . . ".

6. The OCC subsequently intervened in this action and filed its own motion for an injunction against the Commissioner. Specifically, the OCC sought to enjoin the Commissioner "from instituting any enforcement activities against national banks, except for the purpose of enforcing State unclaimed property or escheat laws, or as otherwise authorized by federal law."

7. On April 7, 1999, this Court issued a ruling on the OCC's request for an injunction. In particular, the Court enjoined the Commissioner "from proceeding with his pending administrative enforcement proceeding against [the Banks] pending final disposition of the OCC's complaint." Importantly, however, this Court's order did not "address the Commissioner's intepretation of the ATM statute in dispute, Conn. Gen. Stat. § 36a-156, nor [did] it preclude . . . the Commissioner from further seeking enforcement through judicial means." Finally, this Court's ruling also opined that the Banks' then pending motions for a preliminary injunction should be denied as moot.

8. On April 14, 1999, The Banks filed a motion for reconsideration with respect to the denial of their motions for preliminary injunction.

9. On April 19, 1999, the Commissioner instituted a new state court proceeding, viz. Burke v. Fleet National Bank, First Union National Bank and BankBoston, N.A., Connecticut Superior Court, Judicial District of Hartford, Docket No. CV-99-588717 ("*Burke v. Fleet*"). A copy of the complaint filed by The Commissioner in *Burke v. Fleet* is attached hereto as Exhibit A.

10. The Commissioner has requested a temporary injunction in *Burke v. Fleet*, which injunction is scheduled to be heard on June 1, 1999.

11. On April 21, 1999, this Court denied the Banks' motion for reconsideration with respect to this Court's earlier mootness determination regarding their previously pending motions for a preliminary injunction. Specifically, this Court opined that it could not grant the relief requested because, in the limited context of a motion for reconsideration, neither of the Banks had demonstrated an intervening changing in controlling law, new evidence, or the need to corret a clear error of law or to prevent manifest injustice.

12. The Commissioner's institution of *Burke v. Fleet* raises anew the issue of his interference with the Banks' claimed federal rights. Specifically, the Commissioner, by commencing and maintaining *Burke v. Fleet*, clearly intends to act so as to interfere with the Banks' exercise of their valid federal rights to maintain ATMs and to charge non-depositors for their use. Moreover, this Court's ruling on the OCC's motion for a preliminary injunction did not address the Banks' Section 1983 claims, which claims have, once again, been placed squarely at issue by the Commissioner's latest filing.

13. Based upon the matters set forth in the Anended Complaints and the Affidavits, the Banks are reasonably

likely to prevail on the merits of the claims therein described.

14. Moreover, if the Commissioner is permitted to further prosecute *Burke v. Fleet* (or any other related or similar state court proceedings) or to obtain an injuntion against the Banks before this Court can act, First Union and Fleet will sustain irreparable harm in that the Commissioner will be permitted to unlawfully invoke inapposite and/or invalid state judicial mechanisms to defeat, or to attempt to defeat, the conferral of a valid right under federal alw.

15. No irreparable harm will be experienced by the Commissioner or by non-depositor customers as a result of the maintenance of the status quo since the Banks will not levy non-depositor customer fees during the pendency of the Temporary Restraining Order. For this reason, the Banks should similarly be relieved of the obligation to post any bond in connection with this court's order of the relief herein requested. Likewise, the Banks' ability to arrange for repayment of any fees, if later determined necessary, should relieve them of the obligation to post a bond regarding a preliminary injunction.

16. For the same reasons, the public interest will not be disturbed by the issuance of a Temporary Restraining Order or preliminary injunction.

17. Lastly, since any temporary restraining order issue pursuant hereto must, unless extended for good cause, expire no later than ten days following its issuance, Fed. R. Civ. P. 65(b), the Banks also request that their accompanying motion for preliminary injunction be set down for hearing prior to the expiration of any such order.

WHEREFORE, First Union and Fleet ask that this Court enter a temporary restraining order and a preliminary

injunction against the defendant, The Honorable John P. Burke, acting in his official capacity as Banking Commissioner of the State of Connecticut, enjoining the Commissioner, as well as any other person acting in concert with him or pursuant to his direction, from prosecuting, maintaining or commencing any state court enforcement, restitution, or injunctive proceedings against Fleet or First Union with respect to the matters referred to in said Amended Complaints.

Respectfully submitted,

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